

Chapter 2

General and Miscellaneous Provisions

2-1. Introduction

This chapter defines and identifies the persons protected by the SCRA as well as certain other basic concepts. Additionally, it discusses how and when this protected status attaches, the effect of this status, and, ultimately, how and when it can be modified or terminated. Finally, it considers some other basic concepts and points.

2-2. Definitions and Applicability

a. Basic Definitions. A discussion of the SCRA, like a discussion of most legislation, is best begun with a consideration of fundamental definitions:

50 U.S.C. app § 511

For the purposes of this Act:

(1) **Servicemember.** The term “servicemember” means a member of the uniformed services, as that term is defined in section 101(a)(5) of title 10, United States Code.

(2) **Military service.** The term “military service” means----

(A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard----

(i) active duty, as defined in section 101(d)(1) of title 10, United States Code, and

(ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds;

(B) in the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service; and

(C) any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(3) **Period of military service.** The term “period of military service” means the period beginning on the date on which a servicemember enters military

service and ending on the date on which the servicemember is released from military service or dies while in military service.

(4) Dependent. The term “dependent”, with respect to a servicemember, means---

(A) the servicemember’s spouse;

(B) the servicemember’s child (as defined in section 101(4) of title 38, United States Code); or

(C) an individual for whom the servicemember provided more than one-half of the individual’s support for 180 days immediately preceding an application for relief under this Act.

(5) Court. The term “court” means a court or an administrative agency of the United States or of any State (including any political subdivision of a State), whether or not a court or administrative agency of record.

(6) State. The term “State” includes----

(A) a commonwealth, territory, or possession of the United States; and

(B) the District of Columbia.

(7) Secretary concerned. The term “Secretary concerned”----

(A) with respect to a member of the armed forces, has the meaning given that term in section 101(a)(9) of title 10, United States Code;

(B) with respect to a commissioned officer of the Public Health Service, means the Secretary of Health and Human Services; and

(C) with respect to a commissioned officer of the National Oceanic and Atmospheric Administration, means the Secretary of Commerce.

(8) Motor vehicle. The term “motor vehicle” has the meaning given that term in section 30102(a)(6) of title 49, United States Code.

(9) Judgment. The term “judgment” means any judgment, decree, order, or ruling, final or temporary.¹

Because of the SCRA’s reference to other portions of the United States Code, it is necessary to examine more closely the terms “servicemember” and “military service” because

¹ 50 U.S.C.S. app. § 511 (LEXIS 2006).

both terms are integral to the questions “to whom” and “when the act and its benefits are applicable.”

The SCRA makes the term “servicemember,” equivalent to the term “members of uniformed services” as found in title 10, United States Code. “Uniformed services,” then, “means . . . the armed forces; the commissioned corps of the National Oceanic and Atmospheric Administration; and the commissioned corps of the Public Health Service.”²

The Act likewise defers to the title 10 definition of “active duty” to specify exactly what it means by “military service”:

The term “active duty” means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.³

Simply put, the Act is applicable to members of the Armed Forces, commissioned officers of the Public Health Service, and commissioned officers of the National Oceanic and Atmospheric Administration when they are on active duty. It is applicable to members of the Army, Navy, Air Force, Marine Corps, and Coast Guard Reserves when they are on active duty,⁴ but not when they are on inactive duty.⁵ Similar language from the former provisions

² 10 U.S.C. § 101(a)(5) (2000).

³ *Id.* § 101(d)1. “Full-time National Guard duty” is defined a bit later:

The term “full-time National Guard duty” means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member’s status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under sections 316, 502, 503, 504, or 505 of title 32 for which the member has waived pay from the United States.

Id. § 101(d)(5).

⁴ As the definition provides, “active duty” includes “annual training duty.” *Id.* § 101(d)(1). This is typically the two-week to twenty-nine-day duty that a reservist will perform. *See id.* § 10147(a). *See also* 32 U.S.C. § 502(a). In fact, the courts have acknowledged as much. *See In re Brazas*, 278 Ill. App.3d 1, 662 N.E.2d 559 (1996).

⁵ “Inactive duty” or “inactive duty training” is the type of duty that Guardsmen and reservists perform during the traditional weekend drill periods. *See, e.g.,* U.S. DEP’T OF ARMY, REG. 140-1, ARMY RESERVE: MISSION, ORGANIZATION AND TRAINING ch. 3 (20 Jan. 2004). *See also* 10 U.S.C. § 101(d)(7). As to this type of service, the courts have also confirmed that the law is inapplicable. *See Min v. Avila*, 991 S.W.2d 495, 507 (Tex. App. 1999).

was found to be unambiguous. Retired personnel, not on active duty, cannot take advantage of the act⁶ and neither can members of the reserves when they are not on active duty.⁷

As was pointed out under the prior legislation, the Act is narrow in scope. Under the former provision, several categories of persons related to the military were found to be outside the ambit of the provision making the law applicable to “persons in the military service of the United States.”⁸ For example, a merchant seaman, captured and interned by the Japanese while aboard a Government vessel, was not entitled to the SSCRA’s tolling protections.⁹ Similarly, civilian employees of the armed services,¹⁰ contract surgeons,¹¹ and employees of government contractors¹² have been held to be persons not in the military service of the United States.

The question of when and whether the Act is applicable to members of the Army and Air Force National Guards is trickier. This is because Guardsmen serve in one of three statuses. They may serve under state command and control and under state funding on state active duty.¹³ They may also serve, as members of the federal reserve forces,¹⁴ on federal active duty.¹⁵

⁶ *Jax Navy Federal Credit Union v. Fahrenbruch*, 429 So.2d 1330 (Fla. Dist. Ct. App. 1983); *Lang v. Lang*, 176 Misc. 213, 25 N.Y.S.2d 775 (Sup. Ct. 1941).

⁷ *Betha v. Martin*, 188 F.Supp. 133 (E.D. Pa. 1960).

⁸ 50 U.S.C.S. app. § 511(1) (LEXIS 2006).

⁹ *Osborne v. United States*, 164 F.2d 767, 769 (2d Cir. 1947). Ironically, the same individual would have been subject to court-martial jurisdiction under the Articles of War. *Id.* at 769-70. *But see* *Rosenbloom v. New York Life Ins. Co.*, 163 F.2d 1 (8th Cir. 1947).

¹⁰ *Peace v. Bullock*, 254 Ala. 361, 48 So.2d 423 (1950).

¹¹ *Hart v. United States*, 125 Ct. Cl. 294 (1953) (“fact that his compensation . . . was fixed according to the pay of a commissioned officer [did] not make him a member of the Army”).

¹² *Abbattista v. United States*, 95 F. Supp. 679 (D.N.J. 1951).

¹³ *See, e.g.*, N.Y. MIL. LAW § 6 (Consol. 2003) (“The governor shall have power, in case of invasion, disaster, insurrection, riot, breach of the peace, or imminent danger thereof, to order into the active service of the state for such period, to such extent and in such manner as he may deem necessary all or any part of the organized militia”).

¹⁴ The Army and the Air National Guards of the United States are two of seven reserve components of the United States Armed Forces. 10 U.S.C. § 10101 (2000).

¹⁵ There are many ways for the reserve components to be brought to federal active duty. *See, e.g.*, *id.* § 12302 (LEXIS 2006) (partial mobilization).

Finally, they can serve, as they most often do, in the so called “title 32 status.”¹⁶ In this hybrid status they perform duty under the state’s command and control, but with federal funding.¹⁷

Given the SCRA’s definitions,¹⁸ the Act does not apply to members of the National Guard during state activations or in most traditional, routine Title 32 periods. Likewise, the Act is not applicable to Guardsmen serving full time as Active Guard Reserve Soldiers and Airmen under Title 32.¹⁹ It is applicable to Guardsmen activated under federal calls to active duty. It is also applicable to them, however, when they are in a Title 32 status for periods of more than thirty days in response to a presidential declaration of national emergency.

b. Legal Representatives. Along with the basic definitions, the SCRA clarifies that “[a] legal representative of a servicemember . . . is either [a]n attorney acting on behalf of the servicemember . . . [or] [a]n individual possessing a power of attorney.”²⁰ More importantly, the definition of “servicemember” is expanded to include the servicemember’s legal representative.²¹

2-3. Start and Termination of Protections

Although the SCRA’s protections commence no later than when a person enters active military service,²² there are provisions which expand this coverage. Reserve Component personnel, for example, are entitled to most of the Act’s “rights and protections” on the date

¹⁶ 32 U.S.C. § 502(a) (2000) (outlining the annual drilling and annual training cycle for members of the National Guard).

¹⁷ For a more thorough discussion of the Guard, its history, and questions of status, see *Perpich v. Dep’t of Defense*, 496 U.S. 334 (1990). See also Major Michael E. Smith, *Federal Representation of National Guard Members in Civil Litigation*, ARMY LAW., Dec. 1995 at 41, 41-43; Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of “In Federal Service”*, ARMY LAW., June 1994, at 35, 35-40.

¹⁸ 50 U.S.C.S. app. § 511 (LEXIS 2006).

¹⁹ Decisions under the former law also came to this conclusion. See *Bowen v. United States*, 49 Fed. Cl. 673, 676 (2001), *aff’d*, 292 F.3d 1383 (Fed. Cir. 2002) (stating that active guard reserve soldier serving full time National Guard duty and later period of tile 32 period of annual training could not toll statute of limitations under the SSCRA).

²⁰ 50 U.S.C. app. § 519(a).

²¹ *Id.* app. § 519(b).

²² *Id.* app. § 511(3).

they receive active duty orders.²³ Similar protections would be available to those inducted into the service if the nation were to resume a draft.²⁴ In other words, protections under the Act may be extended and in advance of an actual report date. Furthermore, a servicemember is protected even during “any period which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause.”²⁵

The SCRA’s coverage *normally* terminates “on the date the servicemember is released from military service or dies while in military service.”²⁶ Other sections of the Act qualify this “period of military service.” For example, the protection calling for the stay of a civil proceeding extends for “90 days after termination of or release from military service.”²⁷ As to default judgments, “[a]n application [to set aside a default judgment] . . . must be filed not later than 90 days after the date of termination of or release from military service.”²⁸ Importantly, even when the member has left the service, the right to challenge the default extends for an additional 60 days.²⁹

It is important to establish *exactly* when the particular protection ends. In a 1995 case, a former soldier waited two years and 1 day after discharge to file a tort action. The applicable statute of limitations was two years. Like the SCRA, the former legislation protected servicemembers by including a tolling provision. In any event, the court dismissed the suit,

²³ *Id.* app. § 516(a). The “rights and protections” are those found in Titles II and III of the Act. *Id.* See also *infra* Chapters 3 and 4.

²⁴ See *id.* app. § 516(b). An individual ordered to report to induction is protected even though the induction process is incomplete. See, e.g., *Clements v. McLeod*, 155 Fla. 860, 22 So.2d 220 (1945); *J.C.H. Serv. Station v. Patrikes*, 181 Misc. 401, 46 N.Y.S.2d 288 (1944); *Ostrrowski v. Barczynski*, 45 Pa. D & C. 451 (1942).

²⁵ *Id.* app. § 511(2)(C). See, e.g., *Mason v. Texaco*, 862 F.2d 242, 244 (10th Cir. 1988) (tolling protections extended to cover servicemember who “was placed on the ‘temporary disability retired list’”).

²⁶ 50 U.S.C.S. app. § 511(3) (LEXIS 2006). *Diamond v. United States*, 344 F.2d 703, 170 Ct. Cl. 166 (1965) (stating that release from active duty terminates period of military service, and section of Act which halted operation of statute of limitations during period of military service was not applicable after release from active duty).

²⁷ 50 U.S.C. app. § 522(a)(1).

²⁸ *Id.* § 521(g)(2). Despite the facial clarity of the provision, issues do come up from time-to-time. See, e.g., *Collins v. Collins*, 805 N.E.2d 410 (Ind. App. 2004) (attempt to set aside default judgment twelve years after entry); *In re Paternity of T.M.Y.*, 725 N.E.2d 997 (Ind. App. 2000) (attempt to set aside default judgment sixteen years after entry).

²⁹ 50 U.S.C. app. § 521(g)(1).

holding that the protection allowing for the tolling expired on the last day of the plaintiff's active duty, not the following day (the first day of civilian status).³⁰ In other words, the state's two year statute of limitations started to run the first day after the servicemember left active duty.

2-4. Divestiture

The notion that the servicemember can be absent from duty but only when the absence is "lawful"³¹ brings up a question about whether the servicemember can divest himself of the SCRA's protections. In fact, the courts have recognized this possibility. It has been noted, for example, that absence without leave (AWOL) is not "active duty."³²

In a case involving confinement, an Ohio court held that a soldier sentenced by a general court-martial to five years imprisonment, total forfeiture of pay and allowances, and a dishonorable discharge at the termination of the sentence was not on active duty or service and, hence, was not entitled to the benefits of the Act.³³ In dictum, the court stated:

I do not mean to infer that commitment for any violation of the Army's rules and regulations would divest the soldier of his rights under the Soldiers' and Sailors' Relief Act, but the gravity of the offense charged and the sentence of the Court-Martial are factors which must be considered in determining the question.³⁴

This reasoning was apparently applied in an AWOL case when a court held that a soldier who extended his leave sixteen days without permission to attend the birth of his first child, was entitled to the benefits of the Act.³⁵ Another court, however, concluded that a sailor forfeited his protection under the Act when he was AWOL during his divorce trial.³⁶ In that case, the sailor had been properly served, but subsequently went AWOL and did not appear at the proceedings. In yet another case, a soldier who was AWOL at the commencement of a divorce action, could

³⁰ Hamner v. BMY Combat Systems, 874 F. Supp. 322, 323 (D. Kan. 1995).

³¹ 50 U.S.C. app. § 511(2)(C).

³² United States v. Hampshire, 95 F.3d 999, 1013-16 (10th Cir. 1996).

³³ Mantz v. Mantz, 69 N.E.2d 637 (Ohio C.P. 1946).

³⁴ *Id.* at 639.

³⁵ Shayne v. Burke, 158 Fla. 61, 37 So.2d 751 (1946).

³⁶ Harriott v. Harriott, 211 N.J.Super. 445, 511 A.2d 1264 (1986); *see* Driver v. Driver, 35 Conn. 229, 416 A.2d 705 (Super Ct. 1980).

not later reopen the default judgment by asserting the SSCRA while incarcerated in a county jail. The soldier's continuing AWOL status divested him of SSCRA protection.³⁷

In addition to these cases involving AWOL and other unauthorized absences, service personnel may not be able to claim protection under the act if the true cause of their inability to act is misconduct such as a self-inflicted injury.³⁸

2-5. Waiver of Benefits

Congress first added a section allowing for the waiver of benefits and protections in 1942. The current provision, found at section 517³⁹ is designed to induce servicemembers and their creditors to adjust their respective rights privately and to make it clear that no restrictions have been placed upon the usual right of the parties to re-negotiate an obligation.

That being said, there are a certain number of criteria which must be met if a waiver is to be effective. First, "[a]ny such waiver . . . is effective only if it is in writing and is executed as an instrument separate from the obligation or liability to which it applies."⁴⁰ Any waiver is only good if it "is executed during or after the servicemember's period of military service."⁴¹ Finally, it is only good if written in "12 point type."⁴²

While a servicemember might waive, in writing, certain benefits of the Act, s/he does not thereby waive all other rights under the Act. For example, when litigating the legality of a repossession, the servicemember does not waive the tolling of the statute of limitations as provided by section 525.⁴³ An agreement by a servicemember to waive SCRA rights pursuant to a divorce decree does not waive SCRA rights to any subsequent litigation to enforce or interpret the divorce decree.⁴⁴ Such a waiver must be foreseeable, voluntary, and intentional.⁴⁵

³⁷ *Marriage of Hampshire*, 261 Kan. 854, 934 P.2d 58 (1997). *See also* *U.S. v. Hampshire*, 95 F.3d 999 (10th Cir. 1996).

³⁸ *Burbach v. Burbach*, 651 N.E.2d 1158 (Ind. Ct. App. 1995).

³⁹ 50 U.S.C.S. app. § 517 (LEXIS 2006).

⁴⁰ *Id.* § 517(a).

⁴¹ *Id.* The period of service extends for reservists from the date they receive orders to active duty and for those who are inducted from the date they receive orders. *Id.* § 517(d).

⁴² *Id.* § 517(c).

⁴³ *Harris v. Stem*, 30 So.2d 889 (La. App. 1947).

⁴⁴ *Murdock v. Murdock*, 526 S.E.2d 241, 247 (S.C. 1999).

⁴⁵ *Id.*

The opposite would, of course, be true as well. Re-negotiation, after entry on active duty, will work to reorganize whatever rights and protections the servicemember might have.⁴⁶ The protection, likewise, does not apply to obligations entered into while the servicemember is on active duty.⁴⁷

2-6. Territorial Application, Jurisdiction, and Form of Procedure

In general, the SCRA is applicable in any and every United States territory.⁴⁸ Its procedural protections, such as the protection calling for stays of proceedings,⁴⁹ are applicable in all civil and administrative proceedings.⁵⁰ They are not applicable in criminal proceedings.⁵¹

The Attorney General of the United States opined that the SSCRA was applicable to all agencies of the federal government. In so doing, he invoked the rule of construction that a sovereign is bound by a statute when the sovereign is a chief party of interest in the statute. He recognized this rule as an exception to the general rule of statutory construction that the sovereign is not bound by its own statutes.⁵²

The courts have applied the provisions of the older legislation to the federal government,⁵³ as well as to state⁵⁴ and municipal governments.⁵⁵ Additionally, state courts have

⁴⁶ See, e.g., *S & C Motors v. Carden*, 223 Ark. 164, 264 S.W.2d 627 (1954). See also *Chas. H. Jenkins & Co. v. Lewis*, 259 N.C. 86, 130 S.E.2d 49 (1963).

⁴⁷ *Brown v. Gerber*, 495 P.2d 1160, 1161 (Colo. App. 1972).

⁴⁸ 50 U.S.C.S. app. § 512 (LEXIS 2006).

⁴⁹ *Id.* § 522.

⁵⁰ *Id.* § 512(b).

⁵¹ *Id.*

⁵² 40 Ops Att'y Gen 97 (1941).

⁵³ See, e.g., *Edmonston v. United States*, 140 Ct. Cl. 199, 155 F. Supp. 553 (1957) (Tucker Act); *Berry v. United States*, 130 Ct. Cl. 33, 126 F. Supp. 190 (1954), *cert. denied*, 349 U.S. 938 (1955) (Tucker Act); *cf. Abbattista v. United States*, 95 F. Supp. 679 (D.N.J. 1951) (Suits in Admiralty Act).

⁵⁴ *Parker v. State*, 185 Misc. 584, 57 N.Y.S.2d 242 (Ct. Cl. 1945).

⁵⁵ *Calderon v. City of New York*, 184 Misc. 1057, 55 N.Y.S.2d 674 (Sup. Ct. 1945).

applied the Act in its entirety, regardless of whether a particular provision under which relief is sought has no counterpart in state law.⁵⁶

Subsection 512(b) makes the SCRA applicable to proceedings commenced in any court within a geographical area over which the United States has jurisdiction. Section 511 defines the term “court” very broadly, thereby solidifying section 512’s notion that the law is applicable to administrative proceedings and not merely the traditional civil court proceeding.

For purposes of federal jurisdiction, however, the Act does not generally present a federal question. In *Davidson v. General Finance Corporation*,⁵⁷ the court held that an action against a finance company for fraudulent conversion of an automobile sold at a sheriff’s sale, following the company’s foreclosure of a conditional sales contract, “[was] a common-law action for damages only incidentally involving a federal statute.” There was no federal question, *per se*.⁵⁸ The Act likewise does not provide a right for collateral attack.⁵⁹ In *Garramone v. Romo, et. al.*,⁶⁰ a plaintiff asserted his rights under the SSCRA as part of a civil rights action under 42 U.S.C. § 1983. The SSCRA, while not a jurisdictional statute, may be effectively combined with other causes of action as an equitable argument.

2-7. Extension of Benefits to Citizens Serving with Allied Forces

Section 514 extends the SCRA’s protections to United States citizens who serve in the armed forces of allies.⁶¹ The thrust of this section is to allow those persons who serve in the armed forces of nations that are allied with the United States in the prosecution of a war against a common enemy to receive the protective features of the act to the same extent as those who serve in the United States armed forces.

The protections terminate when the person is discharged or otherwise “release[d] from such service.”⁶² Unlike the former provisions, there is no mention of the characterization of

⁵⁶ *New York Life Ins. Co. v. Litke*, 181 Misc. 32, 37, 45 N.Y.S.2d 576, 581 (1943). *See also* *State v. Goldberg*, 161 Kan. 174, 178, 166 P.2d 664, 667 (1946).

⁵⁷ 295 F. Supp. 878 (D. Ga., 1968).

⁵⁸ *Id.* *See also* 28 U.S.C. § 1331 (2000).

⁵⁹ *Shatswell v. Shatswell*, 758 F.Supp. 662 (D. Kan. 1991). *See also* *Scheidigg v. Dep’t of Air Force*, 715 F. Supp. 11 (D. N.H. 1989), *aff’d*, 915 F.2d 1558 (1st Cir. 1990).

⁶⁰ 94 F.3d 1446 (10th Cir. 1996).

⁶¹ 50 U.S.C.S. app. § 514 (LEXIS 2006).

⁶² *Id.*

service. The former SSCRA required the service be better than dishonorable.⁶³ Moreover, for certain benefits, the service requirement needed to be nothing less than honorable.⁶⁴

2-8. Transfers to take Advantage of the Act

Section 581⁶⁵ is designed to prevent abuse of the Act by servicemembers and civilians alike. It prevents the transfer of property from a non-servicemember debtor to a servicemember so that the servicemember may invoke the SCRA and prevent a creditor from obtaining relief.

The pivotal issue in the few decisions interpreting this section concerns evidence of intent to delay or defeat the enforcement of rights.⁶⁶ Consider the rather obvious, if not egregious, example of a defendant corporation that transferred a deed to one of its officers on the day the officer entered military service.⁶⁷ Under those circumstances, the court had little difficulty denying protection that might have otherwise been available to the servicemember.⁶⁸ Section 581 clearly emphasizes the Act's equitable nature.

2-9. Missing and Deceased Persons

The SCRA makes provision for servicemembers who enter into a missing status. For purposes of the SCRA's benefits and protections, "[a] servicemember who has been reported missing is presumed to continue in service until accounted for."⁶⁹ To understand the exact nature of this provision, it is helpful to begin with a consideration of what is meant by the term "missing."

Within the greater scheme of Veterans' legislation, there are two primary statutes dealing with missing service personnel. The first of these is the Missing Person's Act.⁷⁰ Because this

⁶³ *Id.*

⁶⁴ *Id.* § 572.

⁶⁵ *Id.* app. § 581.

⁶⁶ *See, e.g.,* Lima Oil & Gas Co. v. Pritchard, 92 Okla. 113, 117, 218 Pac. 863 (1923) (1918 Act); Sullivan v. State Bar, 28 Cal.2d 488, 495, 170 P.2d 888, 892 (1946) (evidence insufficient to establish a wrongful purpose).

⁶⁷ Ninth Fed. Sav. & Loan Ass'n v. Parkway West Corp., 182 Misc. 919, 48 N.Y.S.2d 762 (Sup. Ct. 1943).

⁶⁸ *Id.*

⁶⁹ 50 U.S.C. app. § 582(c) (LEXIS 2005).

⁷⁰ The current version of this legislation is codified at 37 U.S.C.S. §§ 551-59 (LEXIS 2006). *See also* 5 U.S.C. §§ 5561-69 (civilian personnel).

law is referenced elsewhere in the SCRA,⁷¹ it is the relevant legislation.⁷² In any event, servicemembers will, under normal circumstances, be accounted for as present for duty, on leave, or absent without leave.⁷³ The Missing Persons Act, however, provides a rough definition of what constitutes a “missing status.” Within that category, servicemembers may be “missing,” “missing in action,” “interned in a foreign country,” “captured, beleaguered, or besieged by a hostile force,” or otherwise “detained in a foreign country against his will.”⁷⁴

The SCRA’s concern, as a practical matter, is not with most of these subcategories. If a command is able to determine that a servicemember is detained in a foreign country, then the benefits, protections, and responsibilities of the SCRA are as they would otherwise be. If the servicemember is deceased, then most of the benefits, protections, and issues come to an end. The SCRA is obviously concerned with those servicemembers whose whereabouts are uncertain. For those who are truly missing, the protections of the Act are available until a more certain determination is made.

The SCRA also provides for deceased servicemembers. For SCRA purposes, “[a] requirement under [the SCRA] that begins or ends with the death of a servicemember does not begin or end until the servicemember’s death is reported to, or determined by, the Secretary concerned or by a court of competent jurisdiction.”⁷⁵

Again, the Missing Persons Act is helpful. It confirms that the secretary concerned must formally continue a person in a missing status or “make a finding of death.”⁷⁶ In other words, the Missing Persons Act confirms that the SCRA’s concern is to only move forward when there has been a satisfactory conclusion that the servicemember is in fact deceased. The open question

⁷¹ See 50 U.S.C. app. § 592.

⁷² The other potentially relevant legislation is the Missing Service Personnel Act of 1995. This law was passed as part of The National Defense Authorization Act for Fiscal Year 1996. See 10 U.S.C.S. §§ 1501-1513 (LEXIS 2006). Ironically, the main gist of this legislation is to insure that missing service personnel are reported and accounted for whereas the Missing Persons Act is designed to insure that missing service personnel continue to receive pay and allowances until it is determined that they have been killed. This debate is of little practical consequence, however, as both laws necessitate that the servicemember be accounted for. See, e.g., 37 U.S.C. § 556(a). See also 10 U.S.C. § 1501. For a thorough discussion of this area of the law, see Major Pamela M. Stahl, *The New Legislation on Department of Defense Personnel Missing as a Result of Hostile Action*, 152 MIL. L. REV. 75 (1996).

⁷³ 37 U.S.C. § 551(2).

⁷⁴ *Id.* § 551(2).

⁷⁵ 50 U.S.C. app. § 592.

⁷⁶ 37 U.S.C. § 555(a).

is the meaning of the phrase “requirement . . . that begins or ends with the death of a servicemember.” The SCRA refers to death in two other sections. First, when a servicemember assigns a life insurance policy to another person, that person cannot exercise any option with respect to that policy until after the servicemember’s period of military service.⁷⁷ The death of a servicemember would of course allow the assignee to exercise his options.⁷⁸ Second, the death of a servicemember will have an impact on the liability of professional liability carriers⁷⁹ and on “the requirement for the grant or continuance of a stay in any civil or administrative action” involving a professional liability claim against a servicemember whose professional liability coverage has been suspended.⁸⁰

The “requirement” language probably works in a broader sense as well. Other “requirements” the law might impose, such as that to stay a proceeding⁸¹ or to toll the running of a statute of limitations,⁸² would cease to have any logical need for consideration upon the death of the involved servicemember.

2-10. Insurance

Three portions of the SCRA relate to life insurance, health insurance, and professional liability protection. There is little controversy surrounding any of these provisions.

a. Life Insurance. The SCRA’s Title IV provides a means by which a servicemember may have the Department of Veterans Affairs (VA) guarantee payment of premiums on certain types of commercial life insurance policies.⁸³ Relatively few servicemembers have applied for benefits under these sections, probably because the law merely provides for a moratorium on premiums and does not relieve the servicemember from liability for repayment of the premiums.

(1) Life Insurance in General. The SCRA’s life insurance provisions are designed to provide a means by which any person entering the armed services may apply for continued protection by commercial life insurance. Upon proper application,⁸⁴ a servicemember may have the

⁷⁷ 50 U.S.C. app. § 536(a).

⁷⁸ *Id.* app. § 536(b). For a further discussion of the assignment protection, *see infra* para. 2-10a(4).

⁷⁹ *Id.* app. § 593(h)(2).

⁸⁰ *Id.* app. § 593(h)(1).

⁸¹ *Id.* app. § 522.

⁸² *Id.* app. § 526.

⁸³ *Id.* app. § 547(a).

⁸⁴ *Id.* §§ 543, 544. *See also* 38 C.F.R. § 7.4 (2004).

premiums and interest for certain types of commercial life insurance guaranteed for his/her “period of military service and for two years thereafter.”⁸⁵

The Secretary of Veterans Affairs is charged with supervising the implementation of these provisions. Section 548⁸⁶ authorizes and directs the Secretary of Veterans Affairs to promulgate regulations and procedures necessary to implement this portion of the SCRA. Pursuant to this authority, the administrator has prescribed regulations in volume 38 of the Code of Federal Regulations, Part 7.

(2) Application. The provisions of the sections apply to commercial life insurance policies taken out by any person in the military service of the United States⁸⁷ “whose life is insured under the policy.”⁸⁸ The policy must be in force on a premium paying basis at the time the service member applies for benefits. The servicemember must have taken out the policy and paid one premium not less than 180 days before the date the insured entered military service.⁸⁹ Also, “the total amount of life insurance coverage protection . . . may not exceed \$250,000, or an amount equal to the Servicemember’s Group Life Insurance maximum limit, whichever is greater, regardless of the number of policies submitted.”⁹⁰

Attorneys should examine policy provisions to determine eligibility. A policy containing a provision that limits or eliminates liability for death arising from or in connection with military service, or any activity that the insured may be called upon to perform in connection with his military service, is not eligible for protection under the Act.⁹¹ A policy that requires the insured servicemember to pay an additional premium because of military service is also outside the purview of the Act.⁹² In fact, to qualify, the policy “may not limit or restrict coverage for any activity required by military service.”⁹³

⁸⁵ 50 U.S.C. app. § 544 (c). *See also* 38 C.F.R. § 7.6.

⁸⁶ 50 U.S.C. app. § 548.

⁸⁷ *See id.* app. § 511(2) for a definition of “military service.”

⁸⁸ *Id.* § 541(3).

⁸⁹ *Id.* app. § 541(1)(B).

⁹⁰ *Id.* app. § 542(c).

⁹¹ *Id.* app. § 541(1)(A). This relates only to the primary death benefit. If a provision limits or eliminates some other benefit, such as double indemnity, the policy will still qualify. 38 C.F.R. § 7.3(a). The insured may opt to continue coverage of those other benefits. *Id.* § 7.6(b).

⁹² 50 U.S.C. app. § 541(1)(A).

⁹³ *Id.* app. § 541(1)(A)(ii).

(3) Nature and Extent of Life Insurance Benefit. An individual entitled to the benefits of the Act may request governmental guarantee of premiums by filing Veterans Affairs Form 29-380⁹⁴ with his/her insurance company and forwarding a copy of the application to the VA.⁹⁵ The VA will then determine whether the policy is covered.⁹⁶ The VA's decision "[is] subject to review on appeal to the Board of Veterans' Appeals and subject to judicial review only as provided in chapter 72 of [title 38]."⁹⁷

Unlike several other SCRA provisions, the insurance protections require no showing of material effect. Any person in military service may apply for relief in accordance with these sections. Relief may be granted regardless of the impact of military service on the individual's ability to pay the premiums.

Once the VA approves a policy for coverage, the "policy . . . shall not lapse, or otherwise terminate, or be forfeited for the nonpayment of a premium, or interest or indebtedness on a premium, after the date on which the application for protection is received by the Secretary."⁹⁸ During this period, the government does not pay the premiums for the service member but simply guarantees that the premiums will be paid at the end of the period.⁹⁹

The insured servicemember must repay the unpaid premiums and interest no later than two years after the expiration of his/her term of military service.¹⁰⁰ If he/she fails to pay these amounts by the end of this two-year period, the amount then due is "treated by the insurer as a loan on the policy."¹⁰¹ This assumes that the policy has a sufficient cash surrender value to cover the amount of the unpaid premiums and interest. If the cash surrender value of the policy is less than the amount owed, the insurance company may terminate the policy and the United States will pay the insurance company the difference between the cash surrender value and the amount of the then outstanding

⁹⁴ U.S. DEP'T OF VETERANS AFFAIRS, VA LIFE INSURANCE PROGRAMS FOR VETERANS AND SERVICEMEMBERS HANDBOOK (2006), *available at* <http://www.insurance.va.gov/inForceGliSite/GLIhandbook/glibooklet.htm> (last visited March 6, 2006).

⁹⁵ 38 C.F.R. § 7.5(a).

⁹⁶ 50 U.S.C. app. § 544(a).

⁹⁷ *Id.* app. § 549. *See also* 38 U.S.C. §§ 7101-11 (2000) (Board of Veterans' Appeals); *id.* §§ 7251-7299 (Court of Appeals for Veterans Claims).

⁹⁸ 50 U.S.C. app. § 544(b).

⁹⁹ *Id.* app. § 547(a).

¹⁰⁰ *Id.* *See also* 38 C.F.R. § 7.6.

¹⁰¹ 50 U.S.C. app. § 547(a).

debt.¹⁰² Also, if the policy matures as a result of death or by any other means during the protected period, the insurance company is required to deduct from the amount of the settlement the unpaid premiums and interest that were guaranteed by the VA.¹⁰³

If the United States is required to pay any amount to an insurance company under the provisions of Article IV, the amount paid becomes a debt due the United States. This amount may be deducted from any other amounts due the insured by the United States.¹⁰⁴ Such a debt may not be discharged in bankruptcy.¹⁰⁵ Additionally, if the policy pays dividends, they may not be paid “[w]hile [the] policy is protected”¹⁰⁶ without VA approval. Instead, the premiums are “added to the value of the policy to be used as a credit when final settlement is made with the insurer.”¹⁰⁷

(4) Assignment of Life Insurance Policies. Title III of the SCRA provides a number of benefits to servicemembers. For instance, it sets forth the rules governing the circumstances under which a servicemember may be evicted.¹⁰⁸ An additional Title III protection involves the assignment of life insurance policies.¹⁰⁹ It is designed to govern the situation where, prior to entry into military service, an insured has assigned his/her life insurance policy as collateral for a loan. After entry on active duty, this section prohibits the assignee from exercising any right or option under the assignment of the policy “without a court order.”¹¹⁰ The need for a court order is typical of the other Title III protections and is required in this instance unless the servicemember consents in writing, or “the premiums on the policy are due and unpaid,” or the servicemember dies.¹¹¹

¹⁰² *Id.*

¹⁰³ *Id.* app. § 546. *See also* 38 C.F.R. § 7.7.

¹⁰⁴ 50 U.S.C. app. § 547(b)(2).

¹⁰⁵ *Id.* app. § 547(b)(3).

¹⁰⁶ *Id.* app. § 545(a). In fact, “[w]hile a policy is protected . . . , cash value, loan value, withdrawal of dividend accumulation, unearned premiums, or other value of similar character may not be available to the insured with the approval of the Secretary.” *Id.* app. § 536(b). On the other hand, “[t]he right of the insured to change a beneficiary designation or select an optional settlement for a beneficiary shall not be affected.” *Id.*

¹⁰⁷ *Id.* app. 545(a).

¹⁰⁸ *Id.* app. § 531. For a further discussion of the major Title III protections, *see infra* Ch. 4.

¹⁰⁹ 50 U.S.C. app. § 536.

¹¹⁰ *Id.* app. § 536(a).

¹¹¹ *Id.* app. § 536(b).

The purpose of this section is to require creditors holding life insurance policies as collateral to obtain court approval before attaching the proceeds of the policy. Resort to any remedy without a court order, or in the absence of one of the other three exceptions, can result in a criminal penalty and “consequential or punitive damages.”¹¹² The court should refuse the request, however, if there is a showing that the military service materially affects “the ability of the servicemember to comply with the terms of the obligation.”¹¹³ Additionally, if the insurance policy premiums are guaranteed under the guarantee provisions,¹¹⁴ they “shall not be considered due and unpaid.”¹¹⁵

b. Health Insurance. Servicemembers are entitled to have their civilian health insurance reinstated when they return to civilian life following periods of active duty.¹¹⁶ Additionally, the reinstatement is to be without a waiting period and there can be no exclusion for a “condition [which] arose before or during the period of . . . service”¹¹⁷ as long as the condition would not have entailed an exclusion or waiting period had the servicemember remained covered¹¹⁸ and “if . . . the condition has not been determined by the Secretary of Veterans Affairs to be a disability incurred or aggravated in the line of duty.”¹¹⁹ The servicemember must apply for reinstatement “not later than 120 days after the date of the termination or release from military service.”¹²⁰

This protection is very similar to the protections found under the Uniformed Services Employment and Reemployment Rights Act (USERRA).¹²¹ In fact, USERRA is the governing provision¹²² for servicemembers participating in employer-offered health plans.¹²³

¹¹² *Id.* app. § 536(d).

¹¹³ *Id.* app. § 536(c)(a).

¹¹⁴ *Id.* app. §§ 541-5489.

¹¹⁵ *Id.* app. § 536(d).

¹¹⁶ *Id.* app. § 594(a).

¹¹⁷ *Id.* app. § 594(b)(1).

¹¹⁸ *Id.* app. § 594(b)(2).

¹¹⁹ *Id.* app. § 594(b)(3).

¹²⁰ *Id.* app. § 594(d).

¹²¹ 38 U.S.C. §§ 4301-4333 (2000).

¹²² *Id.* § 4317.

¹²³ 50 U.S.C. app. § 594(c).

c. Professional Liability Protection. This protection was added to the SSCRA in 1991.¹²⁴ As enacted, it gave protection only to health care providers. Although the Secretary of Defense was allowed to declare other professions eligible, he did not do so until the Kosovo operations when attorneys were included.¹²⁵ Today, the SCRA expressly and permanently extends the protection to attorneys.¹²⁶

The Act provides that professional liability insurance can be suspended during a period of active military service.¹²⁷ The professional is to be reinstated under the coverage following release from active duty¹²⁸ without any premium increase.¹²⁹ Additionally, servicemembers are to receive refunds for premiums paid during any period of suspension¹³⁰ and actions for damages for acts prior to the period of suspension may be stayed.¹³¹ Insurance carriers are not liable for claims during the period of suspension.¹³²

Despite these protections, attorneys and other professionals should consider whether to obtain a so called “tail policy.” Under most insurance contracts, practitioners may be covered at the time a claim is filed even though they were covered at the time an alleged act of professional dereliction occurs.¹³³

¹²⁴ See Major James Pottorff, *The Soldiers’ and Sailors’ Civil Relief Act Amendments of 1991*, ARMY LAW., May 1991, at 47.

¹²⁵ See Lieutenant Colonel Paul Conrad, *Professional Liability Protection for Attorneys Ordered to active Duty*, ARMY LAW., Aug. 1999, at 44.

¹²⁶ 50 U.S.C. app. § 593(a)(2)(A).

¹²⁷ *Id.* app. § 593(b)(2).

¹²⁸ *Id.* app. § 593(c).

¹²⁹ *Id.* app. § 593(d).

¹³⁰ *Id.* app. § 593(b)(2)(B).

¹³¹ *Id.* app. § 593(f).

¹³² *Id.* app. § 593(b)(3).

¹³³ See, e.g., Patrice Wade DiPietro, *CAT [Medical Professional Liability Catastrophic Loss] Fund Not Required to Cover Default Judgment*, 7 LAWYERS J. 2, 12 (2005) (medical malpractice claim discussion). The SCRA contains a provision clarifying that nonfeasance related to a failure to provide for a client’s continued service are deemed to have occurred when the professional fails to provide for that continued assistance rather than when the client discovers the problem. They are deemed to have occurred during the period of coverage, but not during the period of suspension. See 50 U.S.C. app. § 593(b)(4). It would seem however, that this would not obviate the need for a tail policy.

2-11. Public Lands

Perhaps the most obscure SCRA provisions relate to public lands. These provisions,¹³⁴ in essence, provide the servicemember who is a homestead or desert-land entryman,¹³⁵ who has a mining claim, or whose widow has a claim to such land, with the right to obtain waiver of certain requirements as to occupancy and improvement of public lands. For example, “[a] person holding a permit or lease on the public domain under the federal mineral leasing laws who enters military service may suspend all operations under the permit or lease for the duration of the military service and for 180 days thereafter.”¹³⁶

¹³⁴ 50 U.S.C. app. §§ 562-569.

¹³⁵ An entryman is one who makes an entry onto homestead or desert-land as an initial step to acquiring ownership under the public land laws of the United States. *Indian Cove Irr. Dist. v. Prideaux*, 136 P. 618, 620 (1913).

¹³⁶ 50 U.S.C. app. § 565(a).